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February 9, 2000

EX PARTE OR LATE FILED

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

VIA HAND DELIVERY

Magalie Roman Salas  
Secretary  
Federal Communications Commission  
445 12th Street, S.W. - The Portals  
Washington, D.C. 20554

**Re:   *Notice of Ex Parte Presentations***  
***MD Docket Nos. 98-36, 98-200***  
***Assessment and Collection of Regulatory Fees for Fiscal Years 1998/1999***

Dear Ms. Salas:

By its undersigned attorney, COMSAT Corporation ("COMSAT") hereby submits for filing in the above-referenced proceedings this notice of a written presentation submitted to Christopher J. Wright, General Counsel, on January 27, 2000. In addition, two oral presentations were made on January 18, 2000, the substance of which was consistent with the attached written presentation. The oral presentations were made on behalf of COMSAT by Warren Zeger, Howard Polsky, Lawrence Secrest, and Daniel Troy to Grey Pash and Susan Steiman of the General Counsel's office and separately to James Ball of the International Bureau.

In accordance with Section 1.1206(a)(1) of the Commission's rules, two complete copies of this notification are enclosed for filing in each of the above-referenced proceedings. Additional copies are being furnished under separate cover to the above-named Commission personnel.

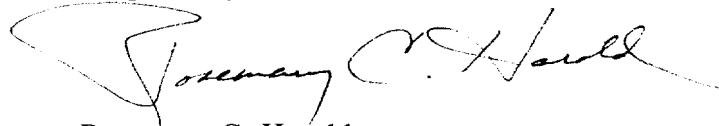
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Magalie R. Salas

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Please date-stamp the attached duplicate upon receipt and return it via messenger for our records. If any questions arise concerning this matter, kindly contact the undersigned.

Respectfully submitted,



Rosemary C. Harold

Enclosure

cc: Grey Pash  
Susan Steiman  
James Ball



Warren Y. Zeger  
Vice President  
General Counsel and Secretary

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Bethesda, MD 20817  
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January 27, 2000

Christopher J. Wright, Esq.  
General Counsel  
Federal Communications Commission  
445 12th Street, N.W.  
Washington, D.C. 20554

Re: Applicability of Section 9 Space Station Fees to COMSAT Corporation

Dear Mr. Wright:

As you know, the U.S. Court of Appeals for the District of Columbia Circuit has remanded the Commission's Report and Order establishing regulatory fees for FY 1998 "for reconsideration of COMSAT's exemption from § 9 space station fees." *PanAmSat Corporation v. FCC*, Case No. 98-1408 (Dec. 21, 1999), slip op. at 15. By this letter, COMSAT respectfully submits its views as to how the Commission should treat this case on remand.

As a threshold matter, the Court's decision does not require the Commission to impose § 9 space station fees on COMSAT for satellites in the INTELSAT and Inmarsat systems.<sup>1</sup> The Court merely disagreed with the particular reasons the Commission advanced for concluding that the statute compelled an exemption for COMSAT. In remanding for further proceedings, the Court explicitly left open the possibility that there might be other bases for concluding that the statute did not subject COMSAT to payment of these fees.

In fact, the statute establishes on its face -- in language not brought to the Court's attention -- that the requirement for the FCC to assess § 9 space station fees does not encompass the facilities used by COMSAT on INTELSAT and Inmarsat satellites. Under the statute, the space station fee is one of several imposed on "Radio Facilities." The line item in question reads in full: "Space Station (per operational station in geosynchronous orbit) (47 CFR Part 25)." The INTELSAT and Inmarsat space stations are not subject to this fee because the Commission does not regulate them under Part 25. Indeed, those "radio facilities" are not subject to U.S. jurisdiction at all. For example, INTELSAT space stations are not subject to the 2° spacing requirements of Section 25.140 of the Rules.

Moreover, the Commission does not regulate COMSAT under Part 25 with respect to INTELSAT and Inmarsat space stations. COMSAT's applications with respect to these space stations are not filed on FCC Form 312, as would be required by Section 25.114 if Part 25 were

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<sup>1</sup> COMSAT must and does pay § 9 space station fees on its U.S.-licensed space stations, i.e., the COMSTAR and MARISAT satellites. COMSAT also pays § 9 earth station fees on all of its U.S.-licensed earth stations, including those that access INTELSAT and Inmarsat satellites, as well as § 9 bearer circuit fees on all of its international traffic, the vast bulk of which is carried on INTELSAT and Inmarsat satellites.

applicable, and the information provided in those applications is not governed by Sections 25.114 and 25.140. Most importantly, COMSAT does not receive a license from the FCC pursuant to Section 25.117. Significantly, § 8 of the Act, which provides for the collection of space station application fees, contains no reference to Part 25. Thus, the fact that COMSAT is subject to § 8 application fees does not suggest that it is also subject to § 9 fees on space station facilities.

When the full text of the relevant statutory provision is taken into account, the legislative report language addressing that provision becomes crystal clear: Congress intended that § 9 space station fees "be assessed on operators of U.S. facilities, consistent with FCC jurisdiction. Therefore, these fees will apply only to space stations directly licensed by the Commission under Title III of the Communications Act." H.R. Rep. No. 207, 102d Cong., 1st Sess. 26 (1991), incorporated by reference in Conf. Rep. No. 213, 103d Cong., 1st Sess. 449 (1993).

The INTELSAT and Inmarsat space stations are not U.S. facilities. Rather, they are expressly treated as non-U.S. facilities and are not licensed by the FCC. As the Commission explained in its *DISCO-II* proceeding, "the phrase 'non-U.S.' satellite system or operator means one that does not hold a commercial space station license from the Commission. By contrast, a 'U.S.' satellite system or operator means one whose space station is licensed by the Commission." *Amendment of the Commission's Regulatory Policies to Allow Non-U.S. Licensed Space Stations to Provide Domestic and International Service in the United States*, 12 FCC Rcd 24094, 24098 n.6 (1997) ("*DISCO-II Order*"). These definitions, which also were not brought to the Court's attention, make clear that Congress did not intend to impose § 9 space station fees on INTELSAT and Inmarsat satellites.

Thus, as the Court itself suggested, the "coverage of the space station category in § 9" is such that a COMSAT-specific exemption is not necessary. Any words to the contrary are *dicta* based on an incomplete record in which key points were not briefed. Indeed, had the significance of Part 25 been brought to the Court's attention, it is highly likely that the Court would have reached a different result. For all these reasons, the Commission may not impose § 9 regulatory fees on INTELSAT and Inmarsat space stations. These substantive considerations apply both prospectively and retroactively.

In addition, there are a number of other reasons why such fees may not be imposed retroactively. First, the Commission's Notice of Proposed Rulemaking for Fiscal Year 1998 did not mention the prospect of imposing space station fees on COMSAT. It simply stated that "entities authorized to operate geostationary space stations (including DBS satellites) will be assessed an annual regulatory fee of \$119,000 per operational station in orbit." *Assessment and Collection of Regulatory Fees for Fiscal Year 1998 (Notice of Proposed Rulemaking)*, 13 FCC Rcd 6977, 7039 (1998) ("*1998 NPRM*"). The *NPRM* also stated that payment unit estimates for the "Space Station" fee category were based on the International Bureau's "licensee data bases." *Id.* at 7019. As noted above, COMSAT holds no licenses from the Commission that "authorize [it] to operate [INTELSAT and Inmarsat] space stations." Thus, the 1998 *NPRM* did not constitute notice to COMSAT, a non-licensee, that it might be subject to space station fees.

**The Commission's Order for FY 1998 also did not discuss whether space station fees might be imposed on COMSAT.** To the contrary, the Order stated that, "due to the tight collection schedule we face at this point, we have no viable alternative other than adoption of the fee as proposed in the *NPRM*. . . . Moreover, since the calculation of annual regulatory fees has been a matter of dispute for several years, we will soon issue a Notice of Inquiry which will entertain suggestions for alternative approaches based on different criteria and information." *Assessment and Collection of Regulatory Fees for Fiscal Year 1998*, 13 FCC Rcd 19820, 19836 (1998) ("1998 Order").

In light of these statements, COMSAT had no notice that its exemption from space station fees might become an issue in the 1998 fee proceeding. The fact that a few parties mentioned the issue in their comments is of no moment; under the APA, notice must come from the agency. *See, e.g., AFL-CIO v. Donovan*, 757 F.2d 330, 340 (D.C. Cir. 1985). In addition, COMSAT was not served with notice of PanAmSat's appeal, and was not notified by the Commission of that appeal.

Because APA notice was inadequate, the FCC lacked authority in the 1998 proceeding to impose space station fees on COMSAT. If the Commission were to commence a new rulemaking now to decide whether to impose such fees for 1998, it would be engaging in a prohibited retroactive imposition of fees. Under the due process standard, a statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in explicit terms. *See, e.g., Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988). In particular, a court must strike down an administrative action that "without notice, gives a different and more oppressive legal effect to conduct undertaken before [the action is taken]." *U.S. v. Hemme*, 476 U.S. 558, 569 (1986).

The Commission also failed to provide notice that it might impose space station fees on COMSAT in the 1999 fee proceeding. Its *NPRM* for FY 1999 mentioned neither the word "COMSAT" nor the phrase "space station." Instead, the Commission simply declared that it "would continue to use the same general methodology [for FY 1999] . . . used in developing fees for FY 1998." *Assessment and Collection of Regulatory Fees for Fiscal Year 1999 (Notice of Proposed Rulemaking)*, 14 FCC Rcd 5918, 5922 (1999). The Commission also noted that "there are 43 Geostationary Space Station licensees" subject to § 9 fees, and made no suggestion that non-licensees might become subject to such fees. *Id.* at 5940.

In any event, the FCC may not impose space station fees on COMSAT for FY 1999 because the fee order for that year is final and non-reviewable as to COMSAT and all other parties except one (CTIA). The 1999 fee order was not appealed (by PanAmSat or anyone else), and is subject only to CTIA's petition for reconsideration on a different issue. While the Commission has sometimes asserted that a petition for reconsideration on any issue permits it to reconsider any other issue *sua sponte*, that position will not withstand judicial review. "Finality with respect to agency action is a party-based concept." *United Transp. Union v. ICC*, 871 F.2d 1114, 1116 (D.C. Cir. 1989). Here, no party sought reconsideration of the Commission's computation of the amount of regulatory fees to be paid by COMSAT, and the time for *sua sponte* reconsideration has long since passed.

Finally, the Commission has no basis for imposing space station fees on COMSAT for Inmarsat or New Skies satellites for FY 1999 or any subsequent year. New Skies was spun off from INTELSAT in November 1998. Inmarsat was fully privatized in April 1999. Both of these events occurred well before the October 31, 1999 cutoff date for FY 1999 fee applicability. Both Inmarsat and New Skies are licensed outside the United States (Inmarsat in the United Kingdom and New Skies in the Netherlands) and both are treated as non-U.S. systems under *DISCO-II*. COMSAT is no longer the U.S. Signatory to Inmarsat and, of course, has no Signatory role with respect to New Skies. Accordingly, the Commission may not impose space station fees on COMSAT for satellites that belong to other entities.

Respectfully submitted,

Warren Y. Zeger

Warren Y. Zeger

cc: Susan Steiman, FCC  
C. Grey Pash, FCC  
James Ball, FCC  
Henry Goldberg, PAS